

Panaji, 25th April, 1991 (Vaisakha 5, 1913)

SERIES II No. 4

# OFFICIAL GAZETTE

## GOVERNMENT OF GOA

### EXTRAORDINARY

#### GOVERNMENT OF GOA

##### Law (Establishment) Department

##### Office of the Chief Electoral Officer

Order

No. 4-14-89/ELEC-Vol. I

The following Order No. 76/GOA/90 (HP)/(1), dated 7th December, 1990 issued by the Election Commission of India, New Delhi is hereby published for the general information.

B. S. Subbanna, Law Secretary/Additional Chief Electoral Officer.

Panaji, 20th December, 1990.

##### Election Commission of India

Nirvachan Sadan,  
Ashok Road,  
New-Delhi — 110001

Dated 7th December, 1990

16 Agraphayan, 1912 (S)

Order

No. 76/GOA/90(HP)(1).— Whereas the Election Commission is satisfied that Shri Hamda Issak Khan, H. No. 192, Pirwaddo Betul, South Goa District Margao a contesting candidate for the General Election to the House of the People, held in 1989 from 1-Panaji constituency has failed to lodge the account of his election expenses in the manner as required by the Representation of the People Act, 1951 and the Rules made thereunder:—

And, whereas, the said candidate neither rectified the defects in his account nor furnished any reason or explanation for the said failure even after due notice by the Election Commission, and the Commission is satisfied that he has no good reason or justification for the said failure;

Now, therefore, in pursuance of section 10A of the said Act, the Election Commission hereby declares the said Shri Hamda Issak Khan, to be Disqualified for being chosen as, and for being a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of a State for a period of 3 years from the date of this order.

By order,  
GHANSHYAM KHOHAR  
Under Secretary

Notification

No. 4-2-90/ELEC

The following Notification No. 82/GOA-LA/4/90/91 dated 11th January, 1991 issued by the Election Commission of India, New Delhi is hereby published for general information.

B. S. Subbanna, Law Secretary/Addl. Chief Electoral Officer.

Panaji, 21st January, 1991.

##### Election Commission of India

Nirvachan Sadan,  
Ashok Road,  
New Delhi - 110001.

Dated: 11th January, 1991.

21 Pausa, 1912(S).

Notification

No. 82/GOA-LA/4/90/91. — In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgement dated the 28th November, 1990 of the High Court of Judicature at Bombay Panaji Bench, Goa in Election Petition No. 4 of 1990.

By order,

GHANSHYAM KHOHAR  
Under Secretary

##### IN THE HIGH COURT OF BOMBAY PANAJI BENCH GOA

##### Election Petition No. 4 of 1990

Shri Mahadev Guno Wadkar, major, — Petitioner.  
businessman, resident of Wadi Betki,  
Marcel - Goa.

Versus

1. Shri Ashley Felix D'Souza, resident — Respondents.  
of H. No. 92, Palmar Grande, Chin-  
chinim, Salcete-Goa.
2. Kum. Farrel Benito Furtado, H.  
No. 656, Cuncolim, Salcete-Goa.
3. Shri Roque S. Avelino Fernandes,  
resident of Velim, Salcete-Goa.
4. Shri Sanjay R. Santan Fernandes,  
resident of Pimplafoll, Velim, Sal-  
cete-Goa.

5. Shri Gabriel Minguel Rodrigues,  
resident of H. No. 774-A, Danddea-  
vaddo, Chinchinim, Salcete-Goa.

Shri A. Viegas, Advocate for the Petitioner.

Smt. S. Albuquerque with Shri J. J. Rodrigues, Advocates  
for Respondent No. 2.

Respondents 3 and 4 present.

Respondents 1 and 5 absent though served.

Coram: G. D. Kamat, J.

Date: 28th November, 1990.

#### J U D G M E N T

The petitioner is the unsuccessful candidate at the last countermanded General Elections to 33-Velim Assembly Constituency for the Legislative Assembly of the State of Goa. Respondent No. 2, who had contested on Congress 'I' ticket, was declared elected. The Elections to the 33-Velim Assembly Constituency were notified in the Official Gazette dated 7th December 1989. As per the programme published the last date for filing nominations was 14th December 1989, the scrutiny was fixed on 15th December 1989 and the last date for withdrawal of nominations was 18th December 1989. The poll was taken on 7th January 1990 and counting of votes on 8th January 1990. The petitioner avers that he filed his nomination papers on 14th December 1989 as an independent candidate and opted for symbol in the order of preference as follows:—

- (1) Pot
- (2) Ladder
- (3) Boat.

According to the petitioner on 18th December 1989 symbols were allotted to all the candidates and a list of contesting candidates showing their symbols in Form 7-A were displayed. On 20th December 1989 he came to the office of the Returning Officer and noted that he had been allotted symbol 'Boat' as per the list displayed on the notice board. The petitioner accordingly started his election campaign on symbol 'Boat'. On or about 28th December 1989 the petitioner received through registered post Form 7-A containing names of all candidates contesting at the said elections and indicating their respective symbols. That Form 7-A is dated 18th December 1989 which showed petitioner's symbol to be 'Boat'. The petitioner now says that he was shocked and surprised to note that on the date of the poll the ballot paper did not show his symbol 'Boat' and instead symbol 'Pot' was shown. This change in the symbol created gross inconvenience amongst the voters as, according to him, there was no way of rectifying the irregularity. It is the case of the petitioner that he met some of the personnel supervising the polls and informed them about the change in the symbol but, however, they pleaded helplessness and pointed out that it was a printing error and that nothing could be done to stop the polls. The petitioner therefore says that on 10th January 1990 he addressed a letter to the Chief Electoral Officer pointing out to him the gross irregularity, but the petitioner was informed that the symbol allotted to him was 'Pot' and that fact was even duly gazetted on the Official Gazette dated 18th December 1989. According to the petitioner the Constituency of Velim has 40% illiterate voters and they form bulk of his supporters and since the candidates in this country are identified by their symbols, an indispensable part of the election, therefore the entire electoral process stands vitiated. Many of his supporters got confused and therefore did not cast their votes or cast them to some other candidate as a result of which the respondent no. 2 got elected. In his assumption he says he would have secured not less than 10,000 votes considering the work/campaign he had undertaken and the response that he received but, however, as a consequence of the illegality he got only 11 votes cast in favour viz. symbol 'Pot'.

He now makes a grievance that the Returning Officer originally impleaded in this petition as respondent no. 6 is a pliant and docile government servant and therefore was appointed as a Returning Officer by the Government in order to facilitate the victory of respondent no. 2 who had contested on Congress 'I' ticket by displacing Vijay Kumar Dev, an I. A. S. Officer who was suddenly transferred elsewhere. The change in symbol according to the petitioner has been brought about by the Returning Officer with the sole intention to deny victory to the petitioner maliciously in a pre-planned move to facilitate the victory of respondent no. 2. This Government servant according to petitioner is a resident

of the village of Cuncolim which is also the village of the respondent no. 2 and he is in close contact with her. It is on these pleadings that the petitioner prays that the election held to that Constituency on 7th January, 1990 and the declaration of the result on 8th January, 1990 be held null and void and direct a fresh election.

2. Respondent no. 2, the returned candidate, has filed written statement. Very many averments made by the petitioner are denied and the thrust is that soon after the last date of the withdrawal of the nominations had crossed, 18th December, 1989 had been fixed with notice to all candidates as a date for allotment of symbols. All candidates were allotted symbols including the petitioner and the symbol allotted to the petitioner was 'Pot'. Despite notice the petitioner was not present at the time of allotment of the symbol. Form 7-A displayed on the notice board on 18th December 1989 showed petitioner's symbol to be 'Pot' with the result, according to the respondent no. 2, there is no change of symbol or re-allocation of symbol as sought to be made out.

The next thrust is that the petitioner was not seriously contesting the election. Barring just filing a nomination he was not at all in the election fray in the strict sense of the term; that he did not carry out any sort of election propaganda in any Constituency; that the petitioner did not print any hand-bills or posters or literature nor set up any banners not even carried out house to house campaign. He did not appoint an election agent during the election process nor had polling agents on the date of the poll nor had any counting agents on the date of counting. The respondent no. 2 then sets out that the story of the petitioner is false and on the contrary he was aware that the symbol allotted to him was 'Pot' but has thrown the challenge in the present petition only as an afterthought to take a off-chance to void the election. It is averred that the petitioner is from Marcel a village far off from the Constituency and he had no contact whatsoever with anyone in the whole Constituency and all that he had done in the entire election process was just to file the nomination paper on 14th December 1989; even on the date the poll was taken he did not know what was happening and therefore did not make any grievance and for the first time made the grievance by his representation to the Chief Electoral Officer on 10th January 1990.

The allegations made against the Returning Officer are denied and more so of his transfer that it was with an ulterior motive and with a view to illegally facilitate the victory of the respondent No. 2.

3. The petitioner had impleaded, in addition to five contesting candidates, the Returning Officer as respondent no. 6, Chief Electoral Officer as respondent no. 7 and Chief Election Commissioner as respondent no. 8. On behalf of respondents 6 and 8 two applications were filed praying that they be struck off from the array of respondents as they are neither necessary nor proper parties to the petition. On hearing the parties an order was made on 22nd June 1990 (Exhibit 23) whereby respondents 6, 7 and 8, namely, the Returning Officer, Chief Electoral Officer and Chief Election Commissioner were deleted and their names struck off from the array of respondents, relying upon the decision of the Supreme Court in *Jyoti Basu and others v. Devi Ghosal and others*, A. I. R. 1972 S. C. 983.

4. Coming back to the pleadings two issues were framed on 5th July 1990 (Exhibit 25) viz.:—

- (1) Does the petitioner prove that he was allotted symbol 'Boat' and conducted his election campaign accordingly?
- (2) Does the petitioner prove that election to Velim Constituency is materially affected by symbol 'Pot' printed on the ballot paper? What relief? What order?

5. Regard being had to the issues above it may be pointed out at this stage itself that no issue is framed on the petitioner's averment that Returning Officer was specially appointed by Government in order to facilitate the victory of respondent no. 2 because he is a pliant and docile Government servant in place of Vijay Kumar Dev and further that the Returning Officer deliberately, intentionally and maliciously in a preplanned move to deny victory to the petitioner and facilitate the victory of respondent no. 2 committed the illegality in change of the symbol. The reason was simple that what was alleged was a serious electoral

mal-practice and yet the petition did not disclose required and necessary material facts and particulars. No grievance was rightly made by the petitioner in the matter of not framing any issue in that behalf. This apart the petitioner did not even furnish proposed draft issues when directed and agreed with the proposed draft issues submitted on behalf of respondent no. 2 dated 29th June 1990 though the Court on its own on hearing the parties framed the above issues covering the relevant controversy in the petition.

There is, however, another way of looking at this now that the evidence is recorded. Despite his case that he was allotted symbol 'Boat' and ballot paper printed symbol 'Pot', he did not lodge any protest in writing on the date of the poll and even on the date of counting and all that he did was to make a representation dated 10th January, 1990 to the Chief Electoral Officer (Exhibit P 36) 2 days after the declaration of the results. Insofar as the contents of this representation (Exhibit P. 36) are concerned he did not make any allegations against the Returning Officer as are now contained in the petition and highlighted above. The only grievance made was that the change of symbol was a grave blunder and illegality by which his election has been adversely affected as the voters were misled. It, therefore, stands to reason that the allegations made against the Returning Officer now in the petition are clearly an afterthought and otherwise devoid of substance.

6. Shri Anacleto Viegas, learned counsel appearing for the petitioner, in his foremost submission contended that there is a change of symbol may be as a result of connivance of the Returning Officer or even by a mistake, inefficiency and incompetence on the part of the Returning Officer as long as the same has come during the course of the election and behind the back of the petitioner or without notice of such change, issue no. 1 must be held to be proved. He now says that if issue no. 1 is held to be proved then automatically issue No. 2 must be held to be proved. He says that apart from bare denials in the written statement on the aspect of the communication of the symbols to the petitioner it is not the case of the respondent no. 2 that the petitioner was informed that there had been subsequent communication to the petitioner that either his symbol was changed or that there had been any re-allocation of the symbol or withdrawal of the symbol 'Boat' substituting it by 'Pot'. Relying upon the evidence of the Returning Officer (Respondent witness no. 1) he says that the letter of allotment of symbol containing list of contesting candidates in Form 7 - A under Rule 10(1) of the Conduct of Election Rules 1961 dated 18th December 1989 was received by the petitioner on 28th December 1989. He says that though petitioner was given notice to remain present at the time of scrutiny and also at the time of allotment of the symbols on 18th December 1989 there is no law that the petitioner must remain present and the law requires that the petitioner must be informed of the allotment of the symbol. He therefore says that the knowledge of the allotment of the symbol according to law had come to the petitioner only on 28th December 1989 when by registered post the Returning Officer sent to him Form 7 - A dated 18th December 1989. He now says that apart from the height of ignorance and negligence on the part of the Returning Officer that communication showing the petitioner's symbol 'Boat' came from the office of the Returning Officer. According to him adverse inferences must be taken against respondent no. 2 because she has not produced the Form 7 - A sent to her by the Returning Officer for if such Form had been produced on record it would show that the symbol allotted to the petitioner was 'Boat' and not 'Pot'. He also says that respondent no. 2 has also not got produced the copy of list of candidates put up by the Returning Officer on the notice board showing their symbols immediately after the allotment of the symbols in terms of Rules 10 and 11 of the Conduct of Election Rules. This according to him is not without a purpose. He now says that when by the communication received by the petitioner on 28th December 1989 symbol allotted to him was 'Boat' and the ballot paper showed symbol 'Pot' a clear cut violation/breach of the law and the Rules is made.

7. Shri Viegas, counsel for the petitioner, asserts that in a country like ours symbol is important and plays a vital part in the elections. He says that that is the only language that is understood by the illiterate voters. He now says that in several authorities of the Supreme Court the position of symbol is highlighted as to how important bearing it has.

It is indeed true that in the country where the electorate is illiterate the symbol is the only language understood by the vast masses of this country.

In the decision of *Sadiq Ali and another v. The Election Commission of India, New Delhi* and others, reported in A.I.R.

1972 S. C. 187 the Supreme Court observed the reasons which led to the introduction of symbols and in that context held that it is well known that overwhelming majority of the electorate are illiterate and in view of this illiteracy it might not be possible for the illiterate voters to cast their votes in favour of the candidates of their choice unless there was a pictorial representation to identify the candidate of their choice and iterated that symbols were brought into use so that it ensures that the process of election is genuine and fair and no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice.

Identical observation was made in the decision of *All Party Hill Leaders' Conference Shillong v. Captain W. A. Sangma and others*, reported in A. I. R. 1977 S. C. 2155 that for the purpose of holding elections, allotment of symbols will find a prime place in a country where illiteracy is still high and symbol as a device for casting votes has proved to be an invaluable aid. That this insignia cannot be defaced all of a sudden.

This position was again reiterated in the decision of *Roop Lal Sethi v. Nacchattar Singh*, reported in A. I. R. 1982 S. C. 1559.

In the first place it must be noted that the first two decisions of the Supreme Court were in connection for a fight for symbol by the two groups after a split of a party or merger between local party with national party. The last decision lays down the law that the change of allotment of symbol as a breach would fall within the purview of Section 100(1)(d)(iv). Nevertheless it must be gainsaid in favour of the petitioner that in elections in our country and for that matter in Goa are fought on the basis of symbol and symbol plays a very important and vital part in elections.

According to Shri Viegas an election dispute is not a lie between a candidate disputing election of the other who is returned elected for in an election dispute it is as if the entire constituency is involved. Shri Viegas has canvassed this point to say that no Returning Officer can be permitted to get away when he commits breaches of electoral process because when a breach occurs it is as if it is a fraud played on the entire Constituency. There is one more reason, according to him, and that is no returned candidate can be permitted to say that I am elected by large number of votes and difference being vast the procedural breaches can be condoned. The argument of Shri Viegas is that it is not open to the respondent no. 2 to contend that she got 8963 votes as against 11 votes polled by the petitioner and therefore the procedural breach of change or allotment of symbol cannot come in the way for voiding the election of respondent no. 2.

He has relied upon the decision of *Jyoti Basu and others v. Dobi Ghosal and others*, reported in A. I. R. 1982 S. C. 983 to suggest that the Supreme Court has held that the concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied and that a Court has no right to resort to them on considerations of alleged policy because policy in such matters relating to the trial of election disputes is what the statute lays down. The Representation of People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. In the decision of *Dr. P. Nalla Thamby Thora v. B. L. Shankar and others*, reported in A. I. R. 1984 S. C. 135 the Supreme Court reiterated that it has consistently taken the view that elections and election disputes are a matter of special nature and that though the right to franchise and right to office are involved in an election dispute it is not a lie in common law nor an action in equity. This decision has in turn referred to the decisions of the Supreme Court in *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*, reported in A. I. R. 1952 S. C. 64 and *Jagan Naik v. Jaawant Singh*, reported in A. I. R. 1954 S. C. 210. These decisions in turn lay down the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitation imposed by it. Further that a statutory requirement of an election law must be strictly observed for the election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to common law and the Court. Same probably is again reiterated in the decision of *Charan Lal Sahu v. Nandkishore Bhatt*, reported in A. I. R. 1973 S. C. 2464.

Turning to the decision of *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others*, reported in A. I. R. 1978 S. C. 85 the Supreme Court observed

that election dispute is not like an ordinary lie between the parties and the entire electorate is vicariously not inertly before the Court. The next thrust is on the principle of pure, clear and fair election.

In my view the principles annunciated are beyond any dispute or challenge. But what is necessary to be found out in the present case which seeks to void the election under Section 100(1)(d)(iv) of the Representation of People Act is whether the election is materially affected in so far as it concerns the returned candidate and it demands proof and that too a very strict proof and that is what is rightly highlighted by Smt. Albuquerque on behalf of respondent no. 2 by placing reliance on authorities which are required to be surveyed.

8. The undisputed fact is Form 7-A, list of candidates dated 18th December 1989 (Exhibit P 35) was forwarded by post to the petitioner on behalf of the Returning Officer which the petitioner says he received on 28th December 1989 showing symbol 'Boat' against his name.

The question is what symbol was allotted to the petitioner on 18th December 1989? and symbol 'Boat' mentioned in that Form 7-A is a typing mistake.

9. On behalf of the petitioner it is now argued that it was not necessary under the law for the petitioner to have remained present on the date the symbols were allotted to the candidates and in as much as Rule 10(6) of the Conduct of Election Rules 1961 clearly predicates that every candidate or his election agent shall forthwith be informed of the symbol allotted, two breaches of law have been committed.

The first being that once the petitioner was communicated that his symbol was 'Boat' in Form 7-A and when admittedly the ballot paper showed symbol 'Pot' against the petitioner's name, this change or re-allotment of the symbol was behind the back of the petitioner. In other words there could not have been any change once the symbol was allotted and duly communicated to the petitioner except by a notice.

The second breach urged is that the symbol had been communicated to the petitioner on 28th December 1989 when the poll was already fixed for 7th January 1990 with the result no gap of 20 days was maintained relying upon Section 30(d) of the Representation of People Act 1951.

These two procedural breaches according to the learned counsel are enough to void the election of the returned candidate and a direction for a fresh poll ought to be made.

10. Rule 10 of the Rules speaks of preparation of list of contesting candidates. The Returning Officers are enjoined to prepare a list of contesting candidates in terms of sub-section (1) of Section 38 (Form 7-A) containing particulars as set out therein and to be prepared in such language or languages as the Election Commission may direct. The Returning Officer is also enjoined to consider the choice of symbol expressed by the contesting candidates in their nomination papers and allot different symbols to each contesting candidate in conformity as far as practicable with his choice and if more contesting candidates than one has indicated their preference for the same symbol, decide by lot to which of the candidates the symbol shall be allotted. Once the allotment of symbols is done every candidate or election agent shall be informed of the symbol allotted and be supplied with a specimen thereof.

With a view to comply with these provisions every candidate besides publication of the election programme in the Gazette, is given notice on the date he files the nomination to remain present for the scrutiny as also to remain present for the allotment of the symbols.

11. The learned counsel for the petitioner is not at all right that every breach or procedural irregularity per se can annul the election. I have already indicated that the only ground taken in this petition to set aside the election of the returned candidate and a further direction for fresh poll is by invoking Section 100(1)(d)(iv), that is to say, non-compliance with the provision of the Act and/or Rules or Orders thereunder. It is not the petitioner's case that this petition travels beyond that ground. It is therefore necessary to find out what is the position of settled law in that behalf.

12. In this context what is urged by Smt. Albuquerque, learned counsel for respondent no. 2 seems to be well founded. It is her contention that election of a returned candidate can be voided on various grounds mentioned under Section 100 sub-section (1) clauses (a), (b), (c) and (d) and further that grounds under (a), (b) and (c) stand entirely on differ-

ent footing than what is available by way of ground under (d) in as much as mere (i) improper acceptance of a nomination paper or (ii) a corrupt practice committed in the interests of returned candidate by an agent other than an election agent or (iii) an improper reception, refusal or rejection of any vote or the reception of any vote which is void and lastly (iv) non-compliance with the provision of the Constitution or of Act or under Rules and Orders provided that the result of the election in so far as it concerns a returned candidate has been materially affected which is a sine qua non. It therefore stands to reason that whereas the election of the returned candidate is voided under clauses (a), (b) and (c) when a case is made out whether or not the result of the election has been materially affected in case of (d) non-compliance of the provisions of the Act or Rules or orders made thereunder no election can be voided unless the result of the election is shown to have been materially affected. It is in this context I will therefore be perforced to reject the contention of the learned counsel that even going by the assumption that the petitioner was allotted symbol 'Boat' and what was printed in the ballot paper was 'Pot' or that he was communicated symbol on 28th December 1989 and the poll was held on 7th January 1990 by themselves are sufficient to void the election. It is clearly incumbent upon the petitioner to prove by cogent evidence that the result of the election in so far as it concerned the returned candidate had been materially affected.

13. The Supreme Court had an occasion to consider material effect on election vis-a-vis presumption and proof on improper rejection and improper acceptance of nomination in the decision of *Mahadeo v. Babu Udai Partap Singh and others*, reported in A.I.R. 1966 S.C. 824. Improper rejection of a nomination is a ground covered under Clause (c) of Sub-section (1) of Section 100 of the Act whereas improper acceptance of nomination is covered under Clause (d). As mentioned earlier Clause (d) enjoins upon the petitioner to prove that the result of the election has been materially affected. The Supreme Court in making distinction between these two aspects falling under two different clauses had to also consider the misprinting of the name of one of the contesting candidates. It was held that misprinting of the name of the candidate on the ballot paper amounts to non-compliance but the proof of such non-compliance does not necessarily or automatically render the election of the returned candidate void and to make the election void the election petitioner had to prove the non-compliance in question by showing that the result of the election has materially affected viz., the returned candidate.

14. This ratio of the Supreme Court has been very well enunciated in a subsequent decision of *Samant N. Balakrishna, etc. v. George Fernandez and others etc.*, reported in A.I.R. 1969 S.C. 1201. In paragraph 24 of the report it is stated thus:—

"The heads of substantive rights in Section are laid down in two separate parts: the first dealing with situations in which the election must be declared void on proof of certain facts, and the second in which the election can only be declared void if the result of the election in so far as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. Without attempting critically to sort out the two classes we may now see what the conditions are. In the first part they are that the candidate lacked the necessary qualification or had incurred disqualification, that a corrupt practice was committed by the returned candidate, his election agent or any other person with the consent of a returned candidate or his election agent or that any nomination paper was improperly rejected. These are grounds on proof of which by evidence, the election can be set aside without any further evidence. The second part is conditioned that the result of the election, in so far as it concerns a returned candidate, was materially affected by the improper acceptance of a nomination or by a corrupt practice committed in his interest by an agent other than an election agent or by the improper reception, refusal or rejection of votes or by any non-compliance with the provisions of the Constitution or of the Representation of the People Act or rules or orders made under it. This condition has to be established by some evidence direct or circumstantial. It is, therefore, clear that the substantive rights to make an election petition are defined in these sections and the exercise of the right to petition is limited to the grounds specifically mentioned."

No doubt this is a case where the corrupt practice was alleged by an agent other than an election agent. A distinction had to be made because the commission of corrupt practice



by a returned candidate or his election agent or another person with the consent of the returned candidate or his election agent is embraced in sub-clause (b) of Sub-section (1) of Section 100 of the Act where the result of the election need not be shown to be materially affected but when the election is sought to be voided by a corrupt practice committed in the interest of the returned candidate by an agent other than an election agent it comes under clause (d)(ii) and therefore it is necessary to be shown by proof that the result of the election had been materially affected.

15. This Court had framed issues and what is further pertinent to note is that issue no. 1 is not isolated by the mere expression "Does the petitioner prove that he was allotted symbol 'Boat'?" but by further rider "and conducted his election campaign accordingly"? Similarly issue no. 2 was framed "Whether the petitioner proves that election to Velim Constituency is materially affected by symbol 'Pot' printed on the ballot paper?"

I am totally in agreement with Smt. Albuquerque when she says that the mere proof of irregularity/breach by itself would not assist the petitioner in voiding the election of respondent no. 2 and what is necessary to be found is even when procedural irregularities are conceded whether the result of the election has been materially affected.

16. It has been vehemently contended on behalf of the respondent no. 2 by Smt. Albuquerque that there has never been any change or re-allocation of symbol insofar as the petitioner is concerned. That right from day one the petitioner had been allotted symbol 'Pot' on 18th December 1989 and it is further her case that the petitioner did not conduct any election campaign not even semblance of a campaign. According to her he was a nonentity in the Constituency. He just filed a nomination form and thereafter was not at all a candidate in the election fray in reality.

17. It is the petitioner's own case that he was allotted symbol 'Boat' and that he himself saw the list of candidates showing symbols displayed on the notice board on 20th December 1989 and therefore accordingly carried out his election campaign in the Constituency on that symbol. It is further his contention that when the ballot paper showed his symbol 'Pot' there had been change or re-allotment of symbol. Let me therefore now take up this matter for discussion.

18. Petitioner has averred in paragraph 6 of his petition that he came to the office of the Returning Officer on 20th December 1989 in the morning and noted that symbol 'Boat' had been allotted to him as per the list displayed. This averment has been denied in paragraph 4 of the written statement by respondent no. 2 and yet the petitioner's evidence before the Court leaves a great doubt as to whether petitioner ever came to the office of the Returning Officer any time on 20th December 1989 until the declaration of the result. The petitioner admits that he did not remain present at the time of the scrutiny nor at the time of the allotment of symbol done on 18th December 1989 despite he had notice. In examination-in-chief he did not make a statement that he ever came to the office of the Returning Officer at any time after 14th December 1989 the day he filed the nomination. In the cross-examination he stated:—

"I never went to the office of the Returning Officer in any connection once I submitted the nomination form and before the actual date of polling. I however attended the office of the Returning Officer only once after counting had taken place and election result had been declared".

With a view to contradict him he was asked with regard to his statement in paragraph 6 of the petition to which he said that it is possible that he had made that statement and then realized that he had to stick to that statement and said that he had gone to the office of the Returning Officer on 20th December 1989. It is not his case that he even met either the Returning Officer or any other Official connected with the election more particularly regard being had to the fact that he had indicated his preference for symbol in the order as follows:—

- (1) Pot
- (2) Ladder
- (3) Boat.

Regard being had to the human conduct and the normal tendencies and further regard being had to personal appeal for a particular symbol, it was but natural for the petitioner to have at least found out on that day as to why his first

preference or his second preference had not been given to him and at least a curiosity to know to whom they were allotted. That however does not appear to be his case at all. He admits not having attended the meeting convened by Returning Officer on 27th or 28th December 1989 when all candidates were called for briefing.

In cross-examination he clearly says:—

"I am not able to say the date on which the symbols were allotted to me and to other contestants and I came to know about the allotment of the symbols for the first time only when I got the letter dated 18th of December 1989 (Exhibit P 35)."

This conduct of the petitioner has a great bearing when one sees the other evidence with regard to his campaign, he alleges to have conducted in the Constituency;

19. According to him the Assembly Constituency of Velim has over 17,000 voters and consists of 5 Village Panchayats (1) Assolna; (2) Velim; (3) Chinchinim; (4) Ambelim and (5) Sirlim-Dramapur. Despite this is a sufficiently large Constituency considering the size of the State of Goa the petitioner says:—

"I had not appointed any Election Agent. I had not appointed Polling Agents on the date the poll was taken. I had not equally appointed Counting Agents when the counting of votes was taken up after the polling. I did not organize any public meeting at any place in my Constituency".

He says that he is a resident of Betqui of Ponda Taluka and his Constituency is about 50 kms. away from his residence. To carry out his election campaign he used to go to Margao by bus which is about 30 kms. from his residence and thereafter take a taxi and go to Velim Constituency. He says that:—

"I never set up any election office in any part of my Constituency".

I will have therefore seen that regard being had to the further evidence which I will point out a little later the petitioner is a total stranger in that Constituency. None of his workers had even known him apart from having any closeness or association with him. In the context that a candidate does not have an election office, does not appoint an election agent, does not appoint polling agents and does not even appoint counting agents is clearly suggestive of what interest the petitioner had in this election and what sort of campaign he must have had in the Constituency.

20. In his evidence he says that once symbol 'Boat' was allotted he started his campaign, he got prepared banners and got posters printed showing his symbol as 'Boat'. Barring this statement and despite issue no. 1 was framed in the manner set out above petitioner did not give any details as to how he carried on his election campaign in his examination-in-chief. However in cross-examination he stated:—

"I did not organize any public meeting at any place in my Constituency. I had set up posters. I am unable to say the places where such posters had been set up or fixed, I had, in fact, given the posters to my workers and asked them to fix them. I got my posters printed at a printing press owned by one Mohandas Lohankar, at Margao. I got printed 1,000 posters at the cost of Rs. 4,000/-. I had not given copy of my posters at the Office of the Returning Officer. I am unable to say the place or places where the banners were prepared. The fact is that the banners were prepared by my workers whom I had instructed to do so. I had told and accordingly my worker Ramrai Tipu Naik got the banners made. This Ramrai Tipu Naik is from Chinchinim. I do not know the ward of Chinchinim where the said Ramrai has his house. I spent in all Rs. 400/- over banners. I am unable to say how many banners were made. I say it may be 10 to 12. I am unable to say the number of banners set up either at Assolna or at Velim or at Chinchinim or at Ambelim and Sirlim-Dramapur... My election campaign consisted of going from house to house with my workers, canvassing for votes. Though I conducted house to house campaign in my Constituency, I am unable to say the places where I came across the banners set up at my instance soliciting votes. I am unable to say the names of the words of the villages where I conducted house to house campaign and this is because I am not a resident of that area".

The posters which he says he got printed did not even bear the name of the Printer and the Publisher. He cate-

gorically says that he did not give declaration as a candidate to the Printer who was supposed to print his posters and further admits that he did not forward a copy of the posters or copy of the declaration to the Office of the District Magistrate and ends up in saying that he did not even obtain the bills from the printer Mohandas in respect of printing charges for his posters and further that he did not maintain expenditure of election campaign. Despite he says that he got printed posters and distributed voters cards, nothing has been produced on record to support his oral evidence. He does not even make a statement that in the statement of expenses that is required to be filed after election he had shown the expenditure incurred by him viz., printing of posters, cards, banners, vehicles. According to him he had engaged a tempo vehicle bearing Registration No. GDS 3435 and which was carrying on the campaign in the Constituency from 25th December 1989 until two days prior to the date of the poll. What is however interesting to notice is when he says:—

"I do not know to whom that tempo belonged but it was arranged by Advocate Almeida. I was paying Rs. 400/- per day including allowances to certain boys who used to be in the vehicle. Rs. 400/- per day included the cost of petrol which was borne by the owner and which included the cost of the loud speaker".

He however further admits that he did not take any permission from the Returning Officer for the use of the vehicles and loud speaker in his campaign. Insofar as the printing of voters' cards are concerned he says he got them printed about 17000 to 18000 in number. According to him the voters' cards were arranged for him by one Prashant Naik from Margao. He admits that this Prashant Naik does not own a printing press and says that he does not know from where Prashant Naik got them printed. Insofar as Prashant Naik is concerned he says:—

"I do not know in what part of Margao this Prashant Naik stays but he has an office near Gomantak Niketan at Margao. He is engaged in the business of advertising".

21. On this evidence it is highly doubtful as to any campaigning was at all carried out by the petitioner. This being his own evidence it may be of interest to scan the evidence of his witnesses. The first comment that may be required to be made insofar as his witnesses are concerned is that, though an attempt is made by the petitioner to show that these witnesses represent the cross-section of the voter-population of the Constituency, their evidence is manufactured and/or tailor-made and fabricated. I will presently restrict myself to the evidence of the witnesses only insofar as his election campaign is concerned.

22. P. W. 2 is Eknath Kumtekar. He says that he is a resident of Betul. He says:—

"I worked for the petitioner in the last General Elections. In the matter of Election campaign I had painted on public streets the name of the petitioner showing his symbol to be Boat. I had also moved in a tempo vehicle for conducting election propaganda. ... My brother has a gaddo (cart shop) selling cigarettes, biscuits, chocolates etc. This was a sort of office for conducting election campaign".

In the first place it is not even the case of the petitioner himself that his name and symbol were painted on public streets for he restricted his campaign only to banners and posters. It is therefore clear that this witness is improvising over the petitioner. Petitioner has clearly stated that he had no election office but the witness says that his brother's cart shop was a sort of election office for the petitioner to conduct election campaign.

In the cross-examination he says:—

"I did not know the petitioner but my brother Gajanan Rama Kumtekar had known him. I do not know for how long my brother Gajanan had known him. My brother Gajanan introduced me to petitioner and that is how I came to know him about a month prior to the election".

He admits that there was no specific reason for his brother to introduce him to the petitioner nor for how long his brother had known the petitioner. Further he says:—

"When I said I painted petitioner's name on the streets it was confined to Bapsoro ward".

It was in 10 places but, however, he cannot indicate the places where he had painted the road. To a probing question as to what paint was used? He said it was distemper and he used 7 litres of such paint and he says it has come

from his own house and yet says that the petitioner did not pay him nor remuneration for the work. Referring to the election campaign by tempo vehicle he says that it started 15 days prior to the date of the poll and one tempo was working continuously in Bapsoro ward. Bapsoro is a small ward of one of the villages out of the 5 big villages which constitute the Constituency. When Registration number of tempo was asked, he says it is GDZ 1791 and the loud speaker mounted on the tempo belonged to one Tukaram Zatekar from his own ward. It is not even the case of the petitioner that any tempo was working for him in Bapsoro ward alone or that its number is GDZ 1791 contrary to the evidence of the petitioner that only one tempo was working bearing Registration number GDS 3435. From the above evidence it is clear that this witness is in the first place a total stranger and does not even say as to how his brother Gajanan knows the petitioner.

23. Next witness is Ramrai Tipu Naik, P.W. 3. In his very short deposition he says thus:—

"Sometime in the month of December last year on one afternoon, petitioner came to my house in the company of one Advocate Cleofat from Assolna. I took the petitioner round the villages. I also distributed his cards, I had set up posters. I also made sight banners. These banners were made out of cloth by me. Banners were set up as follows:— Three in Chinchinim, two in Assolna and three in Betul and Velim. I used to go with the petitioner for canvassing from house to house in the afternoon".

In the cross-examination he admits that:—

"I had never known the petitioner before the elections and I came to know him for the first time when he had come to my house in the company of Advocate Cleofat as mentioned earlier. I have known Advocate Cleofat from Assolna for the last about five years. I had known Advocate Cleofat because he is an advocate. He had never been my advocate in any of the cases. I knew him as many other people know him i. e., in the profession of Advocate".

It is impossible to accept that this witness who does not even have any association or closeness with Advocate Cleofat would oblige the petitioner because Cleofat brought the petitioner to his house on one afternoon. He speaks of the making of the banners for which he was paid Rs. 400/-.

24. Addison D'Cruz is the next witness who is P. W. 4. This young man says that he is a second year law student and the election campaign of the petitioner was done by the assistance of a tempo and the propaganda was for symbol 'Boat'. He then says:—

"I was told that he was moving from house to house as I was not present everywhere. Petitioner had come to my place soliciting votes".

In cross-examination he says that he was not in the house when the petitioner had come to solicit votes. This is hearsay evidence.

25. Coming to the evidence of Jose Marcelino Martins, P.W. 5, it is impossible to accept that a man who says that he took 15 days leave to work for the petitioner in his election campaign finally ended up in saying that he moved with the petitioner on one day going from house to house in his own ward and for about 3 hours at another time in the bazaar and ward called Dandowado. He speaks of petitioner having set up posters etc., but when asked for details about the posters he does not even remember the colour and contradicts the earlier evidence tendered. This apart, he admits that he does know the petitioner yet he assisted the petitioner in the campaign only because he and some of his friends were fed up with local politicians and they had decided to elect an outsider, and that too, an outsider who is totally unknown and stranger to him. He says he does not know from what place he comes but makes a reference that the petitioner comes from Ponda but does not know the ward. In fact petitioner comes from Betqui which is nearly 15 kms. away but interestingly he met the petitioner, according to him for the first time, on 27th/28th December 1989 and that too because a friend of his by name Rosario Fernandes brought him to his house. It is impossible to accept when the witness said in the beginning he took 15 days leave to carry out the petitioner's campaign for the poll which was fixed for 7th January 1990 finally in cross-examination says that he came to know petitioner about 10 days before the poll. If he has met the petitioner for the first time on 27th/28th December 1989

that means he campaigned in the company of the petitioner only after that date. But he took leave 15 days before election even before knowing the candidate.

26. The last witness in P.W.6 Krishna Zatekar. This witness is brought to reinforce the evidence of P.W.2 Eknath Kumtekar as a sort of corroboration. He says he assisted Eknath Kumtekar in fixing posters and painting roads. I have already seen as to how the petitioner himself does not refer to painting of the roads and the improvised testimony of Eknath. No further comment is therefore necessary on this witness.

27. On a consideration of this entire evidence taken together with the statement of the petitioner himself that even on the date of the poll he did not see the ballot paper showing 'Pot' goes to show that the petitioner in reality did not carry out even a semblance of an election campaign. Barring filing of the nomination form on 14th December 1989, the only effective step that he took was after the results were declared on 8th January 1990 in making a grievance about the change of symbol on 10th January 1990. I can safely render a finding that the petitioner was blissfully not aware as to what was happening in his Constituency and on the contrary there are reasons to hold that the petitioner was aware that the symbol allotted to him was 'Pot'. I will come to this part after I have taken up the discussion on issue no. 2.

28. Petitioner seems to be aware that election cannot be voided for procedural breaches of the kind alleged and this is apparent for the reason that in the petition he laid emphasis on illiteracy of the electors and he now brought in an extraordinary but self-defeating story without even otherwise laying any foundation for it in the pleadings. The story adduced in the evidence is that in the Constituency there are large number of supporters of M. G. Party and since the M. G. Party had not set up any candidate of its own, those supporters were expected to support the petitioner and cast their votes in his favour but for the confusion with the change of symbol.

29. Before anything more he said either on the question on the confusion amongst the illiterate voters or on the aspect of supporters of M. G. Party would have cast their votes in favour of the petitioner, let me find out what the evidence suggests viz. votes polled by the petitioner and the returned candidate, namely, respondent no. 2. The petitioner himself says that he polled 11 votes as against 8963 votes polled by respondent no. 2. According to him no other candidate in entire Goa election polled as low as 11 votes in any of the Constituencies. I will have therefore seen that the difference in votes polled by the petitioner and the returned candidate is to the extent of 8952 votes that too out of the total electorate of just over 17,000 voters. The other aspect is that admittedly symbol 'Boat' had not figured in the ballot paper so as to say that some other candidate obtained any advantage out of the purported campaign of the petitioner. I have already held that there was not even a semblance of a campaign on the part of the petitioner but even on the assumption that I am wrong the fact remains that symbol 'Boat' had not figured in the ballot paper.

30. Coming to the aspect of the petitioner's thrust that there was confusion amongst his electorate to show as to how materially the election of the returned candidate had been affected, in paragraph 14 of the election petition the petitioner says:—

"The Constituency of Velim has about 40% illiterate voters who form bulk of the petitioner's supporters."

This statement is mere ipse dixit of the petitioner as no particulars are given as on what basis according to him this percentage of illiteracy has been averred by him. In the second place it is also not known as to how he says that 40% illiterate voters are his supporters.

This is however not all. In the evidence before the Court forgetting what he mentioned in the pleadings he makes a bald statement:—

"According to me about 50 to 55% of the voters of Velim Constituency are illiterate."

In other words the illiteracy amongst the voters has increased by about 10% to 15%. When asked a question in the cross-examination for the basis of this percentage of 50% to 55% of illiteracy his only answer is that it is based upon his estimate. Nothing is sought to be placed on record nor evidence adduced based on any official statistics regarding the literacy/

/illiteracy of the villagers concerned and what is still worst he admits in the cross-examination that he never asked his voters whether they were literate or illiterate. He has indeed increased the percentage of illiteracy in his deposition from what he pleaded for the simple reason only to canvas before the Court that people could not read his name and they go by the symbol and since symbol 'Boat' had not been printed on the ballot paper the voters were confused and that they therefore voted for some other candidate. The fact, however, remains that apart from there being no evidence with regard to the extent of illiteracy in the Constituency, the evidence that he brought of his witnesses represented to be the cross-section of voters belies him, which I will highlight a little later.

31. In paragraph 16 of his petition the petitioner says that he would have secured 10000 votes considering the work done by him in the Constituency and the response received by him. The manner in which this figure and percentage are mentioned have no foundation at all and much less to hold that the election of the returned candidate can be said to be materially affected by that ipse dixit.

32. Let me now come to his bald statement that the supporters of M. G. Party would have supported him and cast their votes in his favour. I have already mentioned that there was no foundation in pleadings but in evidence he states:—

"..... about 30% to 35% of the voters are supporters of M. G. Party."

On a simple calculation 30% to 35% of the total number of electors though not actually voted falls between 4860 to 5660 votes. When a question was put to him what are the basis on which he says then 30% to 35% of the electors are the supporters of M. G. Party he makes an ipse dixit statement that such an assessment was made by M. G. Party. In fact nothing is placed on record and no evidence adduced from any of the leaders of M. G. Party to show in the first place that such assessment had been made and even if such assessment had been made what are the basis thereof.

33. Even if one ignores the statistics, the petitioner in adopting this stand has brought himself in trouble. According to him Dr. Jhalmi who is a big leader of M. G. Party induced him to contest the election and that is why he filed his nomination as an independent candidate. Admittedly M. G. Party had not contested the elections to Velim Assembly Constituency. The question therefore that arises is why should the petitioner is not be set up as an M. G. Party candidate but set up as an independent candidate. Now the reasons are obvious. The M. G. Party had not set up any of its candidate in the election because it had supported the candidature of respondent no. 5 set up by the Janata Dal Party and the petitioner is plainly aware of the same. The petitioner was asked a question:—

"When you say that you contested the last elections at the instance of Dr. Jhalmi who even filled in the nomination form, can you give the reasons as to why M. G. Party did not set you up as its candidate at the said election?"

His answer was:—

"Some of the leaders of M. G. Party had taken a decision not to oppose candidature of Janata Dal candidate."

34. In fact it transpires from the evidence that the fifth respondent who contested on the ticket issued to him by Janata Dal was supported by M. G. Candidate. Big leaders of M. G. Party it appears had even addressed several meetings in the Constituency to canvas and seek votes from their supporters to the Janata Dal candidate. Viewed in this context it therefore becomes difficult to accept the petitioner's case that supporters of M. G. Party would have voted for him.

Despite petitioner's say that he was aware that M. G. Party was supporting Janata Dal candidate his witnesses were made to say that they supported the petitioner in his election campaign and they wanted to vote for him because he was as if set up by M. G. Party.

In opposition to the statement made by the petitioner his witness Ramrai Tipu Naik (P.W.3) says that he wanted to vote for the petitioner because there was no M. G. candidate and because he had bright chance to win the election. When a question was put to this witness whether he was aware that M. G. Party had supported the candidature of any other party, he says that he was not so aware.



Witness no. 4 Addison D'Cruz says that the petitioner had very good chances of getting elected because there was no M. G. candidate in the field and there were 6000 to 7000 voters supporting the M. G. Party, another ipse dixit. In the first place it is not understood as to why this witness not even having seen petitioner's face says that he wanted to vote for the petitioner only because he had bright chance on the assumption that M. G. supporters would vote for him. Nothing but a sheer make belief story fabricated to suit the ends. When a question was put to him as to why he thought that the petitioner was supported by M. G. Party his answer was that he got it verified from his friends.

Similar is the story told by P. W. 2 Eknath Kumtekar that because there was no M. G. candidate therefore the petitioner had bright chances.

35. It is, therefore, impossible to accept that contrary to the fact that M. G. Party had on its own not contested the election and on the contrary supported Janata Dal candidate the witnesses of the petitioner deposed that too vaguely that because there was no M. G. candidate and because he was supported by M. G. Party therefore they decided to vote for the petitioner is not only highly inconceivable but utterly false. I have already highlighted that the evidence of the witnesses of the petitioner is contrary to or otherwise inconsistent with the evidence of the petitioner himself.

36. What is more the evidence of P. W. 5 Jose Marcelino Martins is another ipse dixit. He is an employee of a restaurant in Margao. I have already commented on this witness earlier while appraising the aspect of the petitioner's campaign in the Constituency. Now so far as his evidence that he wanted to support the petitioner because the petitioner is an outsider, says that he and some of his friends had decided not to support the local candidates. Again highly inconceivable and unbelievable and more particularly when according to him he had earlier never met petitioner in his life. What is true of this witness is that he has studied up to S.S.C. and he says that on finding that symbol 'Boat' was not there although he read the name of the petitioner he did not vote for him and he voted for symbol 'Hand' which is the symbol of respondent no. 2. Where was the confusion as far as this witness was concerned even with the change in symbol? In reality he had worked and campaigned for the petitioner. If that be so it is unbelievable that he would vote for 'Hand' merely because 'Boat' was not there and he read petitioner's name on the ballot. But, however, his last part of the evidence assumes significance. He says that Velim Constituency has always returned a Congress 'T' candidate. It is therefore clear that traditionally this is a strong hold of Congress 'T' party.

Coming to the evidence of Krishna Zatekar (P. W. 6) the story is no better! He was merely brought to corroborate the evidence of P. W. 2 Eknath Kumtekar. I have already referred to his evidence earlier. He says in his Bapsoro ward there are about 1500 to 2000 voters and they voted for symbol 'Hand' because they had not found symbol 'Boat'. It is not even his case that all these voters were illiterate so as not to read the name of the petitioner, however, corrected later on and said that not even 2% of the voters can read and write English. When questioned about the voter-population numbering 1500 to 2000, he ended in saying that in Bapsoro ward he has included other places like Zuem, Koklewado and Baradi which are admittedly different wards and ended in saying that he is not able to say how many voters are there in his own ward Bapsoro and to the suggestion that the Bapsoro ward has only 277 voters, he could neither deny nor confirm the same. All these witnesses are total strangers to the petitioner just as the petitioner is a total stranger to the Constituency.

37. Workers not knowing candidates are expected to work for a candidate if set up by an organized party because such workers work for the party. It is still understandable if an independent candidate is supported by influential persons residing in a Constituency unknown workers may work for such independent candidate. It is equally understandable if workers are remunerated for the work by the contesting candidates they may work for him. Unfortunately for the petitioner none of these factors are available. No worker has said that he was paid. It therefore clearly transpires that the evidence of the petitioner is a gotup evidence and fabricated to suit the ends sought in the petition. It totally lacks credence.

38. It is indeed urged by the learned counsel for the petitioner that it is impossible to bring 5000 voters and

examine them in an election petition to prove how the election of the returned candidate is materially affected. This position to a certain extent may be true but the submission of the learned counsel that he adduced the evidence of 5 witnesses who represent the cross-section, namely, three agriculturists, one student and one commercial employee and therefore such evidence must be believed is far from acceptance. It is difficult to accept that the gotup evidence really represent the cross-section and even if it is held to be so the witnesses totally lack credibility on the evidence tendered by them. Not a single witness has readily held out that he could not read the ballot paper and yet every one of them got away by saying that because there was no symbol 'Boat' they voted for symbol 'Hand'. What makes their evidence uncreditworthy is that they have spent lot of their time and even money to canvas for the petitioner and despite knowing and reading the name of the petitioner on the ballot paper merely because symbol 'Boat' was not found they should vote for symbol 'Hand'. This per as shows their credentials.

39. Going on the assumption as asserted by Shri Viegas that there is some evidence about confusion amongst the voters, regard being had to the evidence already appraised in several paragraphs above, the petitioner has dismally failed to prove that the election so far it concerns the respondent no. 2 has been materially affected. None of it. He polled 11 votes as against 8963 polled by respondent no. 2 which represent more than 50% of the total electorate leave alone the number of voters who actually voted on the date of poll needless to say must be less than 17000 in which case the percentage of votes polled by respondent no. 2 is much higher.

40. Smt. Albuquerque has rightly placed reliance on several authorities of the Supreme Court which will amply highlight the present controversy.

41. The first in line is the decision of *Vashist Narain Sharma v. Deu Chandra and others*, reported in A.I.R. 1954 S.C. 513. This was a case where the election of Vashist Narain Sharma was sought to be set aside and further sought a declaration that the respondent no. 2 therein to have been duly elected. In the alternative the election was sought to be declared wholly void on the ground that nomination of respondent no. 4 had been improperly accepted by the Election Officer with the result the election was thereby materially affected. I may not concern myself with the first part. Obviously the alternative relief was sought for declaring the whole election void by invoking ground mentioned in Section 100(1)(d)(i) that is improper acceptance of the nomination of one of the candidates. There was cleavage in decisions rendered by election Tribunals on the interpretation of the expression: —

"The result of the election has been materially affected".

The Supreme Court held that this expression indicated that the result should not be judged by mere increase or decrease in the total number of votes secured by a returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidate as would have brought about the defeat of the returned candidate. What is held in paragraph 5 is all the more important. It is further relevant to observe what is deducible from paragraphs 11, 12 and 13. The language of Section 100(1)(d) is too clear for any speculation of any possibilities. The section clearly lays down that improper acceptance is not to be regarded as fatal to the election unless the Tribunal is of the opinion that the result has been materially affected. It is something impossible to accept the ipse dixit of witnesses coming from one side or the other on some supposed or imaginary grounds. Equally it is held that the onus lies on the petitioner and the question being one of fact has to be proved by positive evidence; if the person who challenges the election is unable to adduce evidence the only inescapable conclusion is that the burden is not discharged and the election must be upheld even though the result may operate harshly upon such person irrespective of any inconvenience resulting on such operation of the law.

In the decision of *Samant N. Balakrishna, etc. v. George Fernandez and others etc.*, reported in A.I.R. 1969 S.C. 1201 reliance is placed in Vashist Narain Sharma's case supra reiterating the principle therein and in paragraph 58 it has clearly held that the matter cannot be considered on possibility holding that Vashist Narain's case insisted on proof and there is no room for any reasonable judicial guess. How far that proof should go or what it should contain is not provided by the legislature. In this particular case the election was sought to be voided on the grounds that an agent other than an election agent of the successful candidate (George



Fernandez) had committed corrupt practice. The ground sought was falling under Section 100(1)(d)(ii) where again petitioner Samant had to show that the election had been materially affected.

Same view is again reiterated and decision of Vashist Narain Sharma affirmed in the decision of **Shiv Charan Singh v. Chandra Bhan Singh and others**, reported in A.I.R. 1988 S.C. 637. That was again a case of improper acceptance of nomination paper holding that the election cannot be set aside on mere surmises and conjectures. Vashist Narain Sharma's case has been heavily relied upon and passages profusely quoted in paragraphs 7 and 8 thereof with further observation that Courts are ill-equipped to speculate as to how the voters would exercise their right of vote by predicating that it is difficult to say in what proportion the voters who had voted for the candidate whose nomination was alleged to have been improperly accepted would have voted for the remaining candidates.

The decision in Vashist Narain Sharma (Supra) though appears to be a vintage decision still holds the field and it has been affirmed and further reiterated as rightly pointed out by Smt. Albuquerque in the decision of **Smt. Lata Devi (Mali) v. Haru Rajwar**, reported in A.I.R. 1990 S.C. 19 rendered on 22nd August 1989.

This was again an election petition in relation to the change in symbol. I can advantageously state the facts involved in this case for better appreciation of the controversy involved presently in the instant case. Pursuant to the notification of the election published to the Bihar Legislative Assembly 19 candidates filed their nomination papers, out of whom 3 withdrew their nominations leaving 16 candidates in the field. The Returning Officer prepared the list of the candidates with allotted symbols on 9th February 1985. Lata Devi who was contesting on Congress 'T' ticket needless to say was allotted symbol 'Hand'. Haru Rajwar was allotted symbol 'Bow and Arrow'. On 14th February 1985 Haru Rajwar received a notice from the Returning Officer intending to change the symbol allotted to Rajwar and after hearing his counsel on 15th February 1985 the Returning Officer re-allotted 'Bow and Arrow' symbol to another contesting candidate Murura Qasi and instead allotted symbol 'Ladder' to Rajwar. The poll had been fixed for 5th March 1985. On the declaration of the result the position that transpired was that Lal Devi obtained 8659 votes as against Haru Rajwar polling 8229 votes and what is pertinent to note is that Murura Qasi on the re-allotted symbol of 'Bow and Arrow' polled 2228 votes. The difference of votes polled between Lata Devi and Haru Rajwar was a mere 420 votes. Haru Rajwar filed election petition challenging the election of Lata Devi firstly on the ground that the change and re-allotment of symbol 'Bow and Arrow' had materially affected the election as he had been the successful candidate in the earlier election from the same Constituency with the symbol 'Bow and Arrow'; that the sudden change of the symbol also left him with less than 20 days time for campaign and it resulted in a confusion amongst his voters as a result of which he lost the election. The election was sought to be voided by invoking Section 30(d) and the change of symbol in violation of Rule 10(5) of the Conduct of Election Rules.

The election dispute proceeded ex parte as against Lata Devi and on the basis of the evidence adduced by the election petitioner Haru Rajwar which solely consisted his own evidence the High Court of Patna voided the election of Lata Devi by accepting the one sided evidence of Haru Rajwar. Lata Devi approached the Supreme Court. Supreme Court on placing reliance on Vashist Narain Sharma's case (A.I.R. 1954 S.C. 513), Samant N. Balakrishna's case (A.I.R. 1969 S.C. 1201) and several more decisions held that the election petitioner Haru Rajwar had dismally failed to discharge the burden of proof that the election of Lata Devi had been materially affected. On setting aside the judgment of the High Court, what is important to notice in the case is that the difference of votes between the election petitioner Haru Rajwar and returned candidate Lata Devi was only 420 votes. The symbol of 'Bow and Arrow' which was earlier allotted to Haru Rajwar was subsequently withdrawn and given to another contesting candidate Murura Qasi and he was re-allotted symbol 'Ladder'. Murura Qasi had polled 2228 votes and despite the fact that difference between Lata Devi and Haru Rajwar was only 420 votes yet the Supreme Court held that inasmuch as the election was sought to be voided under Section 100(1)(d)(iv) the election petitioner Haru Rajwar had to show by cogent evidence that the result of the election had been materially affected. The decision even observed that even after it is held that there was violation of

Rule 10(5) of the Conduct of Election Rules yet the evidence must be such that it must show that the result of the election had been materially affected. In terms the Supreme Court observed that even though spirit of Section 30(d) was not complied with, there was compliance. This finding was in connection with the allegation that it did not leave 20 days time between the date of re-allotment of the symbol and the date of the poll.

In reiterating the earlier decisions the Supreme Court has clearly laid down that a decision in election petition can be given only on positive and affirmative evidence and not on mere speculation and suspicion however strong they are. Again it is highlighted that there can be no dispute about the importance of the symbol in a backward country but this will however not absolve the election petitioner of his burden of proving that the result of the election had been materially affected.

42. It is indeed true that an attempt was made on behalf of the petitioner by his learned counsel Shri Viegas that this case is distinguishable because in the present election petition the petitioner has adduced evidence of several witnesses and in Lata Devi's case barring evidence of the election petitioner Haru Rajwar no other evidence was available. The second distinction is that there had been change and re-allotment of symbol after notice. In my view the distinction sought to be made is devoid of substance and the question is one of rationale viz., the requirement of proving that the election result has been materially affected. The ratio thus laid down therefore in Lata Devi's case which is affirmation of Vashist Narain Sharma's case in my view clearly covers the present election dispute on all fours.

43. I have sufficiently held that the petitioner had not come to the office of the Returning Officer on 20th December 1989 so as to read on the notice board that symbol allotted to him was 'Boat' and not 'Pot'. Based on his own evidence, if one has to accept the case of the petitioner that he came to know of the allotment of the symbol 'Boat' on 28th December 1989 by the communication of Form 7-A (P 35) it is impossible to accept that the petitioner started his campaign on 25th December 1989 and if that is so one has to only wonder on what symbol he started his campaign on that date. This further strengthens my findings that there was no campaign whatsoever and secondly that the petitioner was aware that he was allotted symbol 'Pot' and not 'Boat' though when Form 7-A was forwarded to the petitioner his symbol was shown to be 'Boat' by a typing error.

In this connection the evidence of the Returning Officer (R. W. No. 1) and documents placed on record support the case of the respondent no. 2. The list of candidates showing their symbols in Form 7-A had been published in Official Gazette, Series II, No. 37 and No. 38 dated 18th December 1989 (Exhibit R 51 colly) in English and Marathi and Konkani clearly show the symbol of the petitioner was 'Pot' and not 'Boat'. On the same date Notices under Rule 31(1)(b) (Exhibit R 50 Colly) had been made and documents forwarded to the Government Printing Press for printing of the ballots one in English and two in vernacular languages (Marathi and Konkani) which clearly show petitioner's symbol to be 'Pot' and not 'Boat'. At the instance of the respondent no. 2 the nomination form (Exhibit R 53) filed by the petitioner on 14th December 1989 has been produced by Mamlatdar on behalf of District Election Officer which clearly shown that the symbol allotted to the petitioner on 18th December 1989 is 'Pot' and not 'Boat'. This document (Exhibit R 53) is free from any erasure, interpolation or overwriting.

The evidence of the Returning Officer further shows that he forwarded to the petitioner not only Form 7-A but also forms made under Rule 31(1) in two vernacular languages besides English which clearly show the petitioner's election symbol to be 'Pot'. At least on that date (28th December 1989) the petitioner knows that the symbol allotted to him was 'Pot'. There is no violation of Rule 10 of the Rules or Section 30(d) of the Act because the last date of withdrawal was 18th December 1989 on which date symbols were allotted and the poll was held on 7th January 1990 which obviously meant that the poll was held on the 20th day in compliance with the provision of the Act.

44. The issues accordingly are answered in the negative and against the petitioner. On summarising my conclusions are as follows:—

(1) The petitioner was allotted symbol 'Pot' on 18th December 1989 and he was aware of the same though in Form 7-A, forwarded by post to the petitioner, which he received on or about 28th December 1989, by a typing error showed petitioner's symbol to be 'Boat'.

The petitioner did not carry out or conduct any election campaign on symbol 'Boat' not even a semblance of a campaign.

(2) The election insofar as it concerns respondent no. 2, the returned candidate, was not materially affected for the petitioner dismally failed to prove by cogent evidence that there was any confusion viz., symbol amongst his voters. The evidence of the petitioner and his witnesses is not even in the realm of possibility so as to materially affect the result of the election.

45. Nothing therefore survives in the petition. The petition is dismissed with costs quantified at Rs. 1500/- in favour of respondent no. 2.